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No. 02 685

In The Supreme Court of the United States

RONALD JEFFERY BROWN

Petitioner,

vs.

DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Gregory A. Adamski
Counsel of Record

Karen Conti
Adamski & Conti
100 N. LaSalle Street
Chicago, Illinois 60602
312.332-7800

Attorneys for Petitioner Ronald Jeffrey Brown

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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THE QUESTIONS PRESENTED FOR REVIEW

The issues before the Court are:

Whether the lower courts erred by denying his petition for a writ of habeas corpus where his sentence constituted cruel and unusual punishment.

Whether the lower courts erred by denying his petition for a writ of habeas corpus where he was denied his right to effective assistance of counsel.

THE LIST OF ALL PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The parties to the proceedings in the Supreme Court of Illinois were petitioner Ronald Jeffrey Brown and respondent Director of Corrections of Virginia.

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Petitioner Ronald Jeffrey Brown respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case.

CITATION OF OFFICIAL AND UNOFFICIAL REPORTS

The decision of the United States Court of Appeals for the Fourth Circuit was entered on August 5, 2002 and is not officially reported.

JURISDICTIONAL STATEMENT

The judgment of United States Court of Appeals for the Fourth Circuit was entered on August 5, 2002. The Court's jurisdiction is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states that:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces or in the militia when in actual service of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment states that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial

> jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

The Fourteenth Amendment states, in part, that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall nay State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case seeks certiorari review of the district court's denial of Mr. Brown's petition for a writ of habeas corpus on December 13, 2001 and the subsequent affirmance of that denial by the appellate court on August 5, 2002. Mr. Brown respectfully submits that his January 17, 1997 sentence of 25 years incarceration for one count of aggravated sexual assault (Virginia Code, 18.2-370.1) and one count of indecent liberties (Virginia Code, 18.2-67.3) violates his Eighth Amendment protection from cruel and unusual punishment because it is so severe and grossly disproportionate to the crimes that he committed. Mr. Brown further submits that his Sixth Amendment right to effective assistance of counsel was violated by his trial attorney's performance that fell

below an objective standard of reasonableness and prejudiced him.

STATEMENT OF FACTS

On July 5, 1996, Ronald Brown and his wife, Melita Brown, asked Yolanda Garrison, a co-worker, whether her 9 year old daughter, Charlene, could spend the night with them. Yolanda agreed. Charlene spent the night at the Brown home. Charlene spent many nights at the Brown home. She called the Browns Uncle Ron and Aunt Melita. ROA 1:[1] Verified Petition for Writ of Habeas Corpus by a Person in State Custody ("Verified Petition") at 4.

On July 6, Ronald, Melita, their 15 month old son, and Charlene drove to a nearby shopping mall. Melita left the van and went into a store. Ronald parked the van. Charlene pretended to sleep. Ronald attempted to wake Charlene up. He tickled her neck, under her arms, and her thighs. Charlene continued to pretended that she was asleep. Ronald pulled down her shorts and underwear, fondled her, and penetrated her vagina with his finger. After a short period, he rearranged Charlene's clothing and shook her until she "awoke." Verified Petition at 4-5.

Ronald and the children joined Melita in the mall. Charlene told Melita that she needed to speak with her. Charlene told Melita about what happened. Melita confronted Ronald, who denied the incident. Verified Petition at 5.

On July 7, 1996, Charlene told her mother, Yolanda, about what happened. Yolanda called the police. ROA 3: 12/5/96 Transcript of Proceedings ("Transcript") at 26. On July 24, 1996, the police interviewed Ronald. As a result of

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[1]References to the record include reference to the volume of the Record on Appeal ("ROA"), the particular filing within the volume, and the page of reference.

that interview, Ronald provided a sworn statement to the police and confessed that he fondled Charlene and placed his finger in her vagina. Transcript at 30-32.

Ronald was charged with aggravated sexual battery and taking indecent liberties with a minor. ROA 2: 2 True Bills. He faced a maximum sentence of 25 years if convicted of those charges. The Commonwealth Attorney offered that, in exchange for Ronald's plea to both charges, he would recommend a 5 year sentence, suspended upon the condition that Ronald serve 90 days, on weekends, in the Norfolk City Jail. Memorandum Opinion at 2.

Ronald declined the plea bargain, waived his right to a jury, and was tried by the bench. The bench trial was scheduled to last 15 minutes. ROA 2: Scheduling Order. Charlene, Yolanda, and the interviewing police officer testified. Ronald was found guilty in 15 minutes. Transcript; ROA 2: 1/23/97 Felony Trial Order.

At the sentencing hearing, a presentence report recommended a sentencing range consistent with the sentencing guidelines: 0 to 3 months. ROA 1: Sentencing Guidelines Recommendation.

At the sentencing hearing, Ronald admitted his guilt and stated his remorse. He established that he was a good family man and employee. ROA 2: 1/17/97 Transcript of Proceedings at 2-10. The circuit court sentenced him to 25 years in prison. Id. at 24.

Ronald appealed the conviction to the Virginia Supreme Court on the ground that the circuit court abused its discretion in sentencing him to the maximum statutory penalty. ROA I: Petition for Appeal in Record 0154-99-1. His petition for appeal was denied by the Virginia Court of Appeals on June 23, 1999 (Record 0154-99-1) and by the

Virginia Supreme Court on November 17, 1999 (Record 991673). Both orders are in ROA 2.

Ronald next filed a petition for a writ of habeas corpus with the Virginia Supreme Court.[2] In his petition, Ronald submitted that his trial attorney, James Grandfield, gave him ineffective assistance of counsel concerning his decision to plead not guilty and to proceed with a bench trial. He swore that, if Mr. Grandfield provided him with adequate advice and forcefully recommended that he accept the plea agreement, he would have done so.

More specifically, Ronald presented the Virginia Supreme Court with a litany of verified incidents that show the ineffectiveness, incompetence, inconsistencies, and untruths of James Grandfield, who had been an attorney for less than a year and who was in over his head.

Among other things,

1. Mr. Grandfield told Ronald that, if he went to trial and was found guilty, the trial judge would follow the sentencing guidelines of 3 months. Consequently, Ronald believed that, by pleading not guilty and going to trial, he risked nothing and retained the possibility of avoiding a felony conviction and maintaining his naval career.

2. Mr. Grandfield failed to inform Ronald that the sentencing guidelines were only discretionary, that the trial judge was not obligated to follow the sentencing guidelines, and that the trial judge could sentence Ronald to a 25 year sentence.

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[2]The petition is found in ROA 8. The following factual recitation is based upon the verified habeas corpus petition.

3. Mr. Grandfield failed to inform Ronald that, as long as the trial judge sentenced him within the 25 year maximum sentence allowed, the appellate court would not overturn the sentence.

4. In light of the facts arrayed against Ronald, Mr. Grandfield was not forceful enough in urging him to accept the plea offer.

5. Mr. Grandfield failed to inform Ronald that, although the Virginia Code requires a trial judge to explain departures from the recommended sentencing guidelines, there is no relief if the trial judge ignores the law.

6. Mr. Grandfield failed to appreciate the seriousness of the charges against Ronald and the very real potentially harsh sentence that he could receive.

7. Mr. Grandfield failed to appreciate the overwhelming evidence against Ronald.

8. Mr. Grandfield offered no trial defense for Ronald.

9. Mr. Grandfield failed to enlist Ronald's relatives to convince him to accept the plea offer.

10. Mr. Grandfield failed to advise Ronald that parole is abolished in Virginia.

11. Mr. Grandfield was deficient because he was unaware that the trial judge was a former Commonwealth's Attorney and a harsh sentencer. If Mr. Grandfield communicated these facts to Ronald, he would not have waived a jury and pled not guilty.

The Commonwealth Attorney opposed the issuance of the writ and submitted a detailed affidavit of Mr. Grandfield.

ROA 8: Memorandum of Law; Affidavit. The Grandfield affidavit substantially controverts Ronald's sworn statements in support of the issuance of the petition. The Grandfield affidavit contains no waiver of attorney/client privilege but details attorney/client communications between Mr. Grandfield and Ronald.

In answer to the Grandfield affidavit, Ronald petitioned the Virginia Supreme Court to allow time to submit additional counteraffidavits. ROA 8: Motion for Extension of Time. The Virginia Supreme Court denied the motion. ROA 8: 1/8/01 Order. Before the Virginia Supreme Court made its final ruling, Ronald submitted his own supplemental affidavit and the affidavit of his brother, Michael Brown. ROA 8: Motion to Supplement Record, Supplemental Affidavit of Ronald Jeffrey Brown, Affidavit of Michael Brown.

Without evidentiary hearing or full development of the facts surrounding Ronald's contentions, the Virginia Supreme Court made factual findings and legal conclusions and denied the petition. ROA 8: 3/27/01 Order.

Federal habeas review followed.

Before the district court, Ronald, acting pro se, raised all claims stated in his state court habeas petition and added a claim that his 25 year sentence constitutes cruel and unusual punishment under the Eighth Amendment. Verified Petition. Ronald pled facts concerning the ineffective assistance of his appellate counsel. Specifically, Ronald represented that he requested his attorney to include his Eighth Amendment claim in his last Virginia Supreme Court habeas corpus petition. His attorney did not do so. Verified Petition.

The Commonwealth placed the records of all prior proceedings before the lower court and moved to dismiss.

Ronald filed a pro se answer to the motion. The district court deferred to the Virginia Supreme Court and granted the motion on the grounds that Ronald's Eighth Amendment claim for excessive punishment was procedurally defaulted and that his Sixth Amendment claim of ineffective assistance of counsel was decided by the Virginia Supreme Court and was, in any event, factually and legally baseless.

An appeal to the United States Court of Appeals ensued. The appellate court affirmed the district court.

SUMMARY OF ARGUMENT

Procedural default should not apply to Mr. Brown's Eighth Amendment claim because it would be a fundamental miscarriage of justice to do so and because it would have been futile to include it in the state habeas corpus petition. Mr. Brown's sentence constituted cruel and unusual punishment in violation of the Eighth Amendment. The 25-year sentence and the underlying judgment should also be set aside because Mr. Grandfield was an ineffective attorney. Under the circumstances of this case, the findings and conclusions of the Virginia Supreme Court should be given no weight or consideration. At worst, this matter should be remanded for discovery, full development of the facts, and an evidentiary hearing.

REASONS FOR GRANTING WRIT

Mr. Brown is entitled to 28 U.S.C. §2254 relief. He is wrongly in custody pursuant to a state court judgment. The Eighth Amendment protection from cruel and unusual punishment is "clearly established" and warrants relief.

Pursuant to Supreme Court Rule 10(a), the review of this Court may properly be sought when the decision of a United States Court of Appeals conflicts with the "decision by a state court of last resort" on an "important federal question." The decision by the Fourth Circuit to uphold Mr. Brown's sentence directly conflicts with precedent set by the Mississippi Supreme Court in Davis v. State, 724 So.2d 342 (Miss. 1998) and addresses important constitutional issues.

In Davis, the Mississippi Supreme Court found that there was insufficient evidence in the record to support the imposition of the maximum sentence under the applicable statute. 724 So.2d at 345. In this case, the trial court created a record devoid of explanation for the harsh sentence he imposed. The Davis court held that a case should be remanded to the trial court for resentencing when the maximum sentence is imposed unless egregious circumstances are evident from the record or some other justification is set forth. 724 So.2d at 346.

I. THERE SHOULD BE NO PROCEDURAL DEFAULT

The district court ruled that, because he did not raise it on direct appeal or in his state habeas corpus petition, Mr. Brown is procedurally defaulted on his Eighth Amendment claim. It also ruled that, under Slayton v. Parrigan, 205 S.E.2d 680 (Va. 1974), Mr. Brown could not bring this matter to the Virginia courts because it could have been--but was not--raised at trial or on direct appeal. The lower court properly (but incompletely) notes (at 8) that:
Brown asserts his default should be excused because the failure to raise the claim is attributable to the deficient performance of appellate counsel.

Under Teague v. Lane, 489 U.S. 288, 297-300 (1989), there should be no procedural bar applied to this case. Teague recognizes two exceptions to the application of the

procedural bar. If a petitioner can show cause and prejudice or a fundamental miscarriage of justice, a federal habeas court will not be precluded from reviewing the merits of an otherwise defaulted claim. Rodgers v. Angelone, 113 F.Supp.2d 922, 932 (E.D. Va. 2000); Mackall v. Angelone, 131 F.3d 442, 446 (4th Cir. 1997), cert. den., 522 U.S. 100 (1998); Harris v. Reed, 489 U.S. 255, 260 (1989). Here, under the Slayton rule, collateral relief is unavailable to Mr. Brown. Teague, 489 U.S. at 298.

The existence of cause ordinarily turns upon a showing of: (1) a denial of effective assistance of counsel, (2) a factor external to the defense which impeded compliance with the state procedural rule, or (3) the novelty of the claim. Rodgers, 113 F.Supp.2d at 932.

Here, there is good cause for the omission of Mr. Brown's Eighth Amendment violation claim in his state habeas corpus petition. Simply put, he requested that his attorney put it in the appeal and his attorney refused. "[F]undamental fairness exception applies to claims that defendant asked counsel to raise on direct appeal." Teague, 489 U.S. at 298, citing People v. Hamby, 32 Ill.2d 291, 294-295 (1965). Mr. Brown should not be penalized because his attorney refused his request to present the claim in his state habeas petition. A fundamental miscarriage of justice occurs when a petitioner requests that a legitimate constitutional claim be presented on appeal and that request is refused by his appellate attorney.

Finally, as the Court noted in Justus v. Murray, 897 F.2d 709 (4th Cir. 1990), a petitioner is not required to exhaust a claim where, as here, it would be futile to do so. The law in Virginia is overwhelmingly in favor of upholding any sentence that is within the sentence range set out by Virginia's legislature. It is almost certain that a Virginia court would summarily reject this claim.

II. THE STATE JUDGMENT IS NOT PRESUMPTIVELY CORRECT

The lower court correctly noted that "a determination of a factual issue made by a State court shall be presumed to be correct" (28 U.S.C. 2254(e)(1)) and that the presumption "applies to any findings of fact that have support in the record." Memorandum Opinion at 10.

There is no question that the Virginia Supreme Court made findings of fact in this case. The problem is that these factual findings were made without full development of the case and in the face of sworn contradictions.

In ineffective assistance of counsel cases, Virginia has a long-standing practice that requires "a full record" before a judicial determination is made. Beaver v. Virginia, 352 S.E.2d 342, 352 (Va. 1987). In MuMin v. Virginia, 389 S.E.2d 886, 898 (Va. 1990)(citing Correll v. Virginia, 352 S.E.2d 352, 362 (Va. 1987), the Virginia Supreme Court stated that:

> Trial counsel will not be exposed to the possibility of professional disgrace without an opportunity to defendant himself by giving the rationale for his challenged acts of omission or commission.

In Walker v. Mitchell, 299 S.E.2d 698, 699 (Va. 1983), the Virginia Supreme Court explained the rationale for these practices:

> A separate habeas corpus proceeding affords both sides an opportunity to develop fully the factual and legal bases of their positions with respect to a claim of ineffective assistance of counsel. Using affidavits where appropriate (Code 8.01-660) or a plenary hearing when necessary (Code 8.01-662), the parties can produce a complete record, one that will permit an intelligent disposition of the habeas petition both

in the trial court and on appeal. Of course, if the record of the criminal trial is sufficient itself to show the merit of lack of merit of a habeas petition, the case may be determined upon that record alone. Code 8.01-654(B)(4).

Virginia did not comply with its own law concerning Mr. Brown's habeas petition. The Virginia Supreme Court did not allow "both sides an opportunity to develop the factual and legal bases of their positions...." The Commonwealth Attorney moved to dismiss the petition. Mr. Brown asked for time to submit additional affidavits. The Virginia Supreme Court did not allow time. Mr. Brown filed 2 affidavits. The Virginia Supreme Court ruled. And, most significantly, it ruled in the face of widely disputed sworn statements.

Mr. Brown is entitled to an evidentiary hearing "only if the state court fact-finding process was deficient in some significant respect." Eaton v. Angelone, 139 F.3d 990, 994 (4th Cir.), cert. den. 524 U.S. 934 (1998). In this case, the state court fact-finding process was deficient. Accordingly, the presumption of correctness does not apply to this case.

III. A 25-YEAR SENTENCE IS CRUEL AND UNUSUAL PUNISHMENT.

Mr. Brown's 25-year sentence constituted cruel and unusual punishment and violates his Eighth Amendment rights.

The sentence is so wildly disproportionate that it boggles the mind. Mr. Brown is a first time offender. The sentence is 100 times the recommended sentencing guidelines of 3 months and the sentence recommended by the probation officer. It is 10 times that allowed by the federal sentencing guidelines.

This sentence is a constitutional violation under Solem v. Helm, 463 U.S. 277, 290-92 (1983), where the United States Supreme Court acknowledged that a sentence may violate the Eighth Amendment if it is grossly disproportionate to the crime for which it is imposed.

In United States v. Lockhart, 58 F.3d 86, 89 (4th Cir. 1995), this Court stated that: "It is well settled that proportionality review is not appropriate for any sentence less than life imprisonment without the possibility of parole." Indeed, this Court has noted that "The holding of Solem has been put into doubt by Harmelin v. Michigan....", 501 U.S. 957 (1991). Mr. Brown submits that Solem remains good law and requires a favorable review of his sentencing objections. See Hawkins v. Hargett, 200 F.3d 1279, 1284 (10th Cir. 1999), cert. den. 531 U.S. 830 (2000); Henry v. Price, 223 F.3d 477, 482 (7th Cir. 2000).

In Solem, the Supreme Court affirmed a decision of the Eighth Circuit holding unconstitutional a sentence of life imprisonment without the possibility of parole for a non-violent recidivist with seven felony convictions. Defendant Helm was sentenced under a South Dakota recidivist statute that provided for a maximum penalty of life imprisonment without parole and a $ 25,000 fine for a defendant who had "at least three prior convictions [sic] in addition to the principal felony." 463 U.S. at 281(alteration in original). Mr. Helm had 6 prior felonies. In 1979, when Mr. Helm was convicted of his seventh felony for uttering a "no account" check for $100, the county prosecutor sought a life sentence under the state's recidivist statute. 463 U.S. at 281. Without the recidivist statute, the maximum punishment for this felony was five years in the state penitentiary and a $ 5,000 fine. Mr. Helm was sentenced to life in prison without the possibility of parole. Id.

The Court held that proportionality analysis under the Eighth Amendment applied to terms of imprisonment just as

it applied to capital sentences and fines, although it noted that successful challenges to the former would be "exceedingly rare." 463 U.S. at 289-90. It emphasized that legislatures' "broad authority" to determine appropriate punishments was entitled to "substantial deference." 463 U.S. at 290. No penalty is per se unconstitutional under the Eighth Amendment. Id. The Court stated that "no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment." 463 U.S. at 291, n. 17. Instead, the Court established 3 objective criteria to guide proportionality analysis under the Eighth Amendment: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." 463 U.S. at 292, n. 16.

Applying the three criteria, the Court concluded that Mr. Helm's sentence was grossly disproportionate to his crime of uttering a "no account" check for $100, even in light of his prior six non-violent felony convictions. 463 U.S. at 289-90, 303.

Gross disproportionality requires the Court "to examine the fit between punishment and crime." Hawkins, 200 F.3d at 1284. Mr. Brown's punishment obviously does not fit his crime.

One important factor is whether there is any evidence in the trial record that justifies an extreme sentence under suspect situations. In Davis v. State, 724 So.2d 342, 343-346 (Miss. 1998), defendant Davis was a 25 year old mother sentenced to 60 years in prison for the sale of a fifth of a gram of cocaine within 1,500 feet of a church. She was not an habitual offender. As here, the trial judge failed to give an explanation regarding the imposition of such a long sentence.

The Mississippi Supreme Court held that there was

insufficient evidence to support the maximum sentence allowable under the statute. 724 So.2d at 345. Trial judges must justify any sentence that is harsh or severe for the charge.

Davis is powerful and persuasive precedent. Here, Mr. Brown--a first time offender--was given the maximum sentence allowed under the statute, even though the facts of this particular case did not involve any violence or threats of violence, the prosecuting attorney offered no aggravating evidence at the sentencing hearing, and, despite the requirements of the Virginia Code, the trial judge gave no indication at the sentencing hearing as to why this particular defendant's situation justified the maximum sentence that the judge could give.

In applying the Solem standard to the facts of this case, the following items and considerations are crucial. First, Mr. Brown had no prior criminal record other than a few minor traffic offenses. He had no history of any type of sexual offenses or sexual deviant tendencies. This was the first time that any behavior of this nature occurred. Second, he was 25 years old at the time of the incident. He was just beginning his adult life. He was married for only a few years and supported his wife and 15 month old child. Certainly, a court should see that Mr. Brown-- taking into consideration his young age and the fact that this was a single isolated incident--had strong potential for rehabilitation and counseling. The 25 year sentence suggests--as a matter of law--that the sentencing judge did not consider rehabilitation as a goal for this particular defendant.

The incident involved with the victim was an isolated event that lasted a few moments. The sexual assault involved fondling and brief digit penetration. Surely this type of assault should not be treated as harshly as a perpetrator who

uses his penis for penetration or who forces a child to perform oral sex on him.

There were no threats or physical violence associated with the incident. Solem, 463 U.S. at 296. It is usually this type of aggravating factor that would give cause for a judge to sentence a defendant more harshly than others.

Mr. Brown knew the victim for close to a year. She slept over at his house on a weekly basis and called him "Uncle." There are no facts here to suggest that Mr. Brown was a sexual predator who hung around playgrounds or that the incident was premeditated. There are no other allegations by Charlene. This shows that this incident was truly isolated.

Mr. Brown did not have an alcohol or drug problem at the time of the incident. This supports the view that he would have a better chance at rehabilitation.

Looking to the Solem's second prong, Mr. Brown's sentence is wildly disproportionate to the Virginia sentencing guidelines and to other sentences rendered in the Commonwealth. Commonwealth v. Osborne, Record 0326-98-3 (February 23, 1999) (Osborne convicted of 2 counts of aggravated sexual battery; sentenced to 20 years in jail with entire sentence suspended); Commonwealth v. Holden, Record 0912-97-4 (March 31, 1998) (Holden convicted of aggravated sexual battery; sentenced to 10 years imprisonment with 5 years sentence suspended); Commonwealth v. Blaylock, Record 1579-96-4 (February 17, 1998), (Blaylock convicted of aggravated sexual battery; sentenced to 8 years); Commonwealth v. Clark, Record 0240-98-1 (August 3, 1999) (before the very same judge who sentenced Mr. Brown, Clark was convicted of 2 counts of aggravated sexual battery, taking indecent liberties with a minor while in a custodial relationship, animate object sexual penetration, and sodomy; conduct started at age 5; victim

testified that "Because he did this so often and for so long, she did not realize his conduct was improper until she learned about sexual abuse in sex education class at school;" sentenced Mr. Clark to 13 years incarceration.

The 25-year sentence of Mr. Brown bears no relationship to any sentence rendered for similar conduct in the modern judicial history of Virginia.

The third prong of the Solem test also supports striking down Mr. Brown's sentence. The closest analogous federal criminal violation is 18 U.S.C. §§2244, "Abusive Sexual Contact." Under §§2A3.4(a)(3), there is a base level offense of 10, with an increase of 6 levels under §§2A3.4(b)(1) because the victim is under 12 years of age and a further increase of 2 levels under §§2A3.4(b)(3) because defendant was in a supervisory position. The total offense level would be 18, which--when combined with Mr. Brown's Criminal History I, would have resulted in a sentencing range of 27 to 33 months in prison.

IV. MR. BROWN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

A defendant deprived of his Sixth Amendment right to effective assistance of counsel must establish that his attorney's performance fell below an objective standard of reasonableness and that he was prejudiced by the attorney's deficiency. Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

The performance prong requires the lower court to determine whether counsel's conduct, viewed from counsel's perspective at the time and in light of all the circumstances, fell "outside the wide range of professionally competent assistance." 466 U.S. at 688-89.

The prejudice prong requires the lower court to determine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The adequacy of a defense attorney's representation is evaluated without "the distorting effects of hindsight and in the light of the circumstances as they existed at the time." 466 U.S. at 689.

The circumstances as they existed at the time leading up to the trial that:

(1) on July 6, 1996, within minutes of the crimes, Charlene told Melita Brown what happened and Melita confronted Mr. Brown;

(2) on July 8, 1996, Charlene told her mother, who called the police;

(3) on July 22, 1996, Charlene told 3 police investigators the same story; and

(4) on July 24, 1996, Mr. Brown confessed in an oral statement that was recorded and transcribed to a written statement that he then signed. Two officials were present at the confession.

Within 18 days of the crimes, the same set of facts was related by the victim and the perpetrator to 7 different parties. The evidence against Mr. Brown--despite his subsequent denials--was overwhelming. Only the most inexperienced or incompetent attorney would draw any conclusion other than that there was no realistic hope that Mr. Brown would be acquitted.

Instead, Mr. Grandfield went on a rampage of incompetence. He told Mr. Brown that, if he went to trial

and was found guilty, the trial judge would follow the sentencing guidelines of 3 months. He failed to inform Mr. Brown that the sentencing guidelines were only discretionary, that the trial judge was not obligated to follow the sentencing guidelines, and that the trial judge could sentence Mr. Brown to a 25-year sentence. He failed to inform Mr. Brown that, as long as the trial judge sentenced him within the 25-year maximum sentence allowed, the appellate court would not overturn the sentence. He failed to inform Mr. Brown that, although the Virginia Code requires a trial judge to explain departures from the recommended sentencing guidelines, there is no relief if the trial judge ignores the law.

In light of the facts arrayed against Mr. Brown, Mr. Grandfield was not forceful enough in urging him to accept the plea offer. He failed to appreciate the seriousness of the charges against Ronald and the very real potentially harsh sentence that he could receive. He failed to appreciate the overwhelming evidence against Ronald. He offered no trial defense for Mr. Brown.

Mr. Grandfield failed to enlist Mr. Brown's relatives to convince him to accept the plea offer. He failed to advise Mr. Brown that parole is abolished in Virginia. He was deficient because he was unaware that the trial judge was a former Commonwealth's Attorney and a harsh sentencer.

All of these facts lead to the overwhelming conclusion that Mr. Grandfield was deficient and that his deficiency caused prejudice to Mr. Brown.

CONCLUSION

A petition for a writ of certiorari should issue and the decision of the Virginia vs. Brown should be reversed and remanded for further proceedings.

Gregory A. Adamski
Karen Conti
Adamski & Conti
100 N. LaSalle Street
Chicago, Illinois 60602
312.332-7800
Counsel for Petitioner

APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 02-6091

RONALD JEFFREY BROWN III
Petitioner-Appellant

versus

DIRECTOR, DEPARTMENT OF CORRECTIONS; ATTORNEY GENERAL OF THE COMMONWEALTH OF VIRGINIA
Respondents-Appellees

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, District Judge. (CA-01-405-3)

Submitted: July 15, 2002 Decided: August 5, 2002

Before WILKINS and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Gregory Adam Adamski, ADAMSKI & CONTI, Chicago, Illinois, for Appellant. Richard Bain Smith, Assistant Attorney General, Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Ronald Jeffrey Brown, III, seeks to appeal the district court's order denying relief on his petition filed under 28 U.S.C.A. §

2254 (West 1994 & Supp. 2002). We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we deny a certificate of appealability and dismiss the appeal on the reasoning of the district court. See Brown v. Director Dep't of Correction, No. CA-01-405-3 (E.D. Va. Dec. 13, 2001). We deny Brown's motion for oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Ronald Jeffrey Brown,
Petitioner,

v. Civil Action No. 3: 01cv405

DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

MEMORANDUM OPINION

Ronald Jeffrey Brown, a Virginia state prisoner, has filed a petition for writ of habeas corpus challenging his convictions for aggravated sexual battery and taking indecent liberties with a minor.

I. FACTUAL AND PROCEDURAL HISTORY

On Saturday, July 6, 1996, Ronald Brown and his wife Melita Brown asked Yolanda Garrison if her nine-year old daughter, Charlene, could spend the night with them. Yolanda agreed.

That evening, Ronald, Melita, and Charlene drove to the mall. Upon arriving at the mall, Melita went into a store while Ronald parked the van. Charlene pretended to be asleep. Ronald tickled Charlene, then pulled down her shorts and underwear, fondled her and stuck his finger in her vagina. Charlene pretended to be asleep during the incident. Ronald stopped fondling Charlene.

Melita arrived back at the van. Melita, Ronald, and Charlene went into the mall. Charlene told Melita that she needed to speak with her. Charlene related the above

incident to Melita. Melita then began yelling at Ronald who denied doing anything.

On Sunday, Yolanda Garrison heard Charlene crying. The next morning, Yolanda asked Charlene what was wrong. Charlene explained what had happened when she was in the van with Ronald. Yolanda contacted the police.

On July 24, 1996, Officer Arnetta Thompson interviewed Ronald Brown. As a result of that interview, Ronald provided a sworn statement to Thompson wherein he confessed that he fondled Charlene and placed his finger in her vagina.

Ronald Brown was charged with aggravated sexual battery and taking indecent liberties with a minor. Brown faced a maximum sentence of twenty-five years if convicted of those charges. The Commonwealth Attorney agreed that in exchange for Brown's plea of guilty to the foregoing charges, he would recommend that Brown receive a sentence of 5 years, such time to be suspended conditioned upon Brown serving 90 days, on weekends, in the Norfolk City Jail.

Brown rejected the plea offer and decided to be tried by the Court. Prior to trial, Brown represented to the Circuit Court that he understood the charges against him, had discussed his case with his attorney, and was pleading not guilty, knowingly and voluntarily. (12/5/1996 Tr. at 6). Following a brief trial at which, Charlene Garrison, Yolanda Garrison, and Arnetta Thompson testified as to the facts described above, Brown was found guilty.

Following his trial, Brown maintained his innocence. (1/17/1996 Tr. at 6). Brown told the probation officer that "[h]e made the statement to the police only in an attempt to save his job [and] . . . . adamantly denies any wrongdoing." Presentence Report at 9. Brown further suggested to the probation officer that Charlene's parents encouraged her to fabricate the story in order to extort money from Brown.

In order to determine an appropriate sentence, the Circuit Court ordered Brown to be evaluated by a psychologist, Thomas Pasquale, Ph.D. Brown continued to

profess his innocence to Pasquale. (1/17/1996 Tr. at 6). Specifically, Brown told Pasquale "I did not sexually molest [Charlene] or touch her in the private area . . . I told the police I was guilty because they said it was the right thing to do. I wanted to save my Navy career . . . You know, I believe Charlene was only following what her mother told her to say." Psychological Report at 2. The report also indicates that Ronald Brown continued to profess his innocence to his wife and that she believed that he was in fact innocent.

At sentencing, Ronald Brown testified that he lied to the probation officer and to Dr. Pasquale when he denied molesting Charlene. (1/17/1996 Tr. at 6). Brown explained that he was afraid of admitting what he had done for fear of losing his wife. Id. at 7. The Circuit Court then sentenced Brown to the maximum punishment of twenty-five years in prison.

Brown appealed his sentence on the ground that the Circuit Court abused its discretion in sentencing him to the maximum statutory punishment. The Supreme Court of Virginia refused Brown's petition for appeal.

Thereafter, Brown filed a petition for a writ of habeas corpus with the Supreme Court of Virginia wherein he asserted that he was denied effective assistance of counsel because of advice given by counsel, James Garfield, respecting the decision to plead not guilty and to proceed to trial. Brown claimed that contrary to his representations at trial and his statements to the probation officer and Dr. Pasquale, he would have pled guilty had counsel provided him with adequate advice and forcefully advised him the accept the plea. Specifically, Brown asserted that:

Claim One "Mr. Grandfield told the petitioner that if he went to trial and was found guilty, the trial judge would follow the sentencing guidelines of 3 months. Consequently, petitioner believed that, by pleading not guilty and going to

trial, he was risking nothing and would retain the possibility of avoiding a felony conviction as well as the possibility of maintaining his naval career.

Mr. Granfield failed to inform the petitioner that the guidelines were only discretionary, that the judge was not obligated to follow the sentencing guidelines, and the judge could sentence the petitioner to the full twenty-five year sentence . . . Mr. Granfield failed also to inform the petitioner that as long as the judge sentenced the petitioner within the 25 year maximum sentence allowed that the appellate court would not overturn the sentence."

Claim Two	In light of the facts arrayed against Petitioner, counsel was not forceful enough in urging Petitioner to accept the plea offer.
Claim Three	Counsel should have enlisted Petitioner's relatives to convince him to accept the plea offer.
Claim Four	Counsel failed to advise the Petitioner's relatives that parole had been abolished.

Claim Five Counsel was deficient because he was unaware that the trial judge was a former Commonwealth's Attorney and a harsh sentencer. Had counsel communicated these facts to petitioner he would not have waived a jury and pled not guilty.[1]

The Attorney General for the Commonwealth of Virginia opposed the motion and submitted a detailed affidavit from Brown's trial counsel, James Granfield, which stated in pertinent part that:

> Brown had [initially] expressed to me his intention to take the plea in circuit court.
>
> I repeatedly expressed to Mr. Brown that he did not have a realistic chance of acquittal. Sometime after the preliminary hearing and before trial . . . Mr. Brown expressed to me his stated desire to go to trial rather than accept the plea. I repeatedly emphasized to Mr. Brown that his concerns for his career and unrealistic hopes of staying in the Navy, were simply without merit. It was Mr. Brown who insisted on going to trial against my advice . . . .
>
> In discussing the sentencing guidelines with my clients, I tell them the law: that a judge must consider the guidelines, but is not bound to follow them. Without a specific recollection of conversation, I am nonetheless confident that is what I would have told Mr. Brown about the

---

[1] Brown also complains that immediately before sentencing counsel incorrectly guessed that the court would suspend a portion of the sentence. Brown fails to explain and the Court fails to discern how Brown was prejudiced by this bad guess.

guidelines. I did not tell Mr. Brown the judge would follow the sentencing guidelines.

I am confident that I explained to him the discretionary nature of the guidelines . . . . . In preparing for trial, I informed Mr. Brown that courts are given great discretion in matters of sentencing . . . .

Mr. Brown asserts that I offered no defense at trial. In that regard, he is correct because he had no viable defense, yet he chose to go to trial . . . Mr. Brown had told me in confidence that the incident did in fact happen. Thus, I could not ethically put him on the stand and have him testify otherwise . . . .

However, the assertion that I was incompetent for failing to discuss Mr. Brown's case with other family members is simply without merit. Former Disciplinary Rule 4-10 specifically prevented me from violating Brown's confidences without his permission . . . .

I advised Mr. Brown that parole did not exist in Virginia in 1996 . . . .

Mr. Brown's assertion that I was not personally familiar with Judge Rutherford is correct. His assertion that he entered the not guilty plea based on my advice is incorrect; **he** chose to go to trial **against** my advice. He is correct that, when he insisted on talking the case to trial I did advise him to waive trial by jury, based in large part on the nature of the case and the strength of the Commonwealth's case.

The Supreme Court of Virginia credited counsel's version of the plea process and denied Brown's petition.

In his present § 2254 petition, Brown continues to insist that he is entitled to habeas relief on the five grounds stated above.

Brown also adds one additional ground for relief:

Claim Six — Petitioner's twenty-five-year sentence constitutes cruel and unusual punishment.

II. SUBSTANTIVE AND PROCEDURAL RESTRICTIONS GOVERNING FEDERAL HABEAS

This Court's warrant to grant habeas relief is restricted by the doctrine of procedural default and statutorily imposed deference to state court findings of fact and law.

A. Procedural Default

If a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the habeas petitioner has procedurally defaulted his federal habeas claim. See Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998). A procedural default also occurs when a habeas petitioner fails to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991). Absent a showing of cause and prejudice or a fundamental miscarriage of justice, a federal habeas court is precluded from reviewing the merits of a defaulted claim.

Claim Six never was presented to the Virginia courts. Such a claim would be barred if he now attempted to present such a claim to the Virginia courts. See Slayton v. Parrigan, 205 S.E.2d 680 (Va. 1974) (precluding inmates from raising claims in state habeas proceedings if they could have been raised at trial and on direct appeal, but were not). Brown asserts his default should be excused because the failure to

raise the claim is attributable to the deficient performance of appellate counsel.

In order to prove that appellate counsel was constitutionally deficient, petitioner must demonstrate that an Eighth Amendment challenge to his sentence clearly was stronger than the argument that the circuit court had abused its discretion in sentencing him to the maximum sentence. See Smith v. Robbins, 120 S.Ct. 746, 765 (2000). Here, neither argument was meritorious. The Supreme Court has emphasized that courts "should be reluctant to review legislatively mandated terms of imprisonment, and that successful challenges to the proportionality of particular sentences should be exceedingly rare." Hutto v. Davis, 454 U.S. 370, 374 (1982) (per curiam). And, the Supreme Court has never set aside a sentence for a term of years on the grounds that it violated the Eighth Amendment. Id. at 371-73. In light of this authority, appellate counsel's decision to challenge Brown's sentence under state law, rather than Eighth Amendment grounds was within the bounds of competent performance. Claim Six will be dismissed.

B. Deference To State Court Findings Of Fact And Law

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that to demonstrate the ineffective assistance of counsel, a defendant first must show that counsel's representation was deficient and, then, must establish that the deficient performance prejudiced the defense. Id. at 687. Under the prejudice prong, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Where, as here, the defendant asserts that he was denied effective assistance of counsel in conjunction with a not guilty plea, he must demonstrate that "counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. 52, 57 (1985). This, under Strickland's

second prong, the defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, he would have pled guilty and accepted the plea offer. Id. at 59.

Additionally, under 28 U.S.C. § 2254(d), a federal court may not grant a writ of habeas corpus based on any claim that was adjudicated on the merits in state court unless the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

However, the larger hurdle to Brown's claims for habeas relief is found in 28 U.S.C. §2254(e)(1). The presumption is not limited solely to findings made subsequent to evidentiary hearings, but applies to any findings of fact that have support in the record. See Mendiola v. Schomig, 224 F.3d 589, 593 (7th Cir. 2000). Brown bears the "burden of rebutting the presumption of correctness by clear and convincing evidence." Id.

III. ANALYSIS

In rejecting Brown's claims that he would have accepted the plea offer and pled guilty but for counsel's advice regarding his probable sentence and his probable chances for acquittal (Claims One and Two), the Supreme Court of Virginia found that,

> (T)he record demonstrated that the petitioner's trial counsel recommended to him that he accept the plea agreement based on the possible sentence he faced and the evidence against him . . . . (T)he petitioner's trial counsel told him that he did not have a realistic chance of acquittal and thus attempted to persuade the petitioner to accept the plea . . . . (T)rial counsel correctly informed petitioner of the discretionary nature of the sentencing guidelines and the possible sentences he could receive.

The foregoing facts are presumed correct. See U.S.C. § 2254(e)(1). Brown's unsupported, self-serving statements are insufficient to rebut this presumption in light of Brown's sworn statement at his arraignment, and his post-convictions professions of innocence. Such statements belie his present assertions that, prior to trial, he was willing to plead guilty. Cf. Raines v. United States, 423 F.2d 526, 528-31 (4th Cir. 1970) (rejected inmates's claim that his guilty plea was induced by undisclosed promises from the United States Attorney, where inmate's pre-trial letters clearly expressed his desire to plead guilty). Accordingly, Brown has failed to demonstrate that counsel was deficient or that he was prejudiced by counsel's advice.

Similarly meritless is Brown's assertion that his attorney failed to advise him about the abolition of parole (Claim Four). Counsel swore that he advised Brown that parole had been abolished and that Brown conceded in his supplemental affidavit tendered to the state court that, "I don't remember whether we talked about parole . . . ." Thus, the Supreme Court of Virginia found that, "petitioner's trial counsel correctly advised him that parole had been abolished." Brown has not demonstrated this finding was incorrect. Accordingly, Claim Four will be dismissed.

In Claim Three, Brown contends that counsel was deficient for not enlisting family members to persuade

Brown to accept the plea offer. In rejecting this claim, the Supreme Court of Virginia noted that, "petitioner's counsel was ethically obligated not discuss the case with others without the petitioner's consent, and the petitioner could have discussed the case with anyone he wished." Moreover, the decision of whether or not to accept a plea bargain is the sole province of the accused in a criminal case, and counsel is under an "affirmative duty" to avoid placing undue influence on that decision. See Jones v. Murray, 947 F.2d 1106, 1111 (4th Cir. 1991). Here, counsel had advised Brown of his possible sentence and his dim prospects of acquittal and urged Brown to accept the plea offer. Claim Three will be dismissed.

Finally, Brown contends that counsel was deficient, for advising to pursue a bench trial rather than a jury trial, in light of the circuit judge's reputation for handing down harsh sentences. Whether Brown was tried by a jury or a judge, his conviction was a foregone conclusion. Counsel concedes that he was unfamiliar with the judge and his sentencing proclivities. Brown has cited no decision where such ignorance was found to constitute constitutionally deficient performance. Hence, this Court cannot conclude that the Supreme Court of Virginia's rejection of this claim was unreasonable. See William v. Taylor, 529 U.S. 362, 412-13 (2000). Claim Three will be dismissed.

The Clerk is directed to send a copy of this Memorandum Opinion to Brown and to counsel of record.

It is so ORDERED.

Robert E. Payne
United States District Judge

Richmond, Virginia
Date: December 13, 2001